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FILED
JAN 27 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 494

HOLLIS WILLIAMS,
Petitioner,

vs.

BURNEY J. LINDSEY, ADMINISTRATOR OF THE ESTATE OF VERNA HELEN LINDSEY, DECEASED,
Respondent.

REPLY BRIEF OF PETITIONER.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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To the Honorable Earl G. Warren, Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

Petitioner, defendant below, is compelled to bring to the attention of this Honorable Court several statements and contentions contained in Respondent's brief which expressly or by implication distort Petitioner's position before this Court.

In reviewing the trial court's denial of Petitioner's application for continuance, the matter must be considered only in light of such information as the trial judge had before him at that time, and not in light of information coming to his attention during the trial, itself. When the trial judge denied Petitioner's application for continuance, he did not have actual knowledge of the contents of Petitioner's depositions nor of Petitioner's statement, attached thereto as an exhibit. Therefore he had no basis upon which he could conclude that Petitioner had already given all the testimony necessary for an adequate presentation of his case. In the absence of such actual knowledge, the trial court's ruling was purely arbitrary, and constituted a gross abuse of discretion.

The gravamen of Respondent's brief is that the trial court was not guilty of an abuse of discretion in denying Petitioner's third application for a continuance *because the trial court had actual knowledge of the contents of the two depositions which had been previously taken of Petitioner.* From this misleading statement by Respondent, this Court would naturally gather the impression that the trial court actually read and considered these two depositions. Contrary to Respondent's statement to this effect, the fact is that *the two depositions taken of Petitioner,* respectively on May 23, 1951 (R. 91, *et seq.*) and July 3, 1951 (R. 100, *et seq.*), *were not actually considered and read by the trial judge when he ruled upon defendant's third application for continuance* on February 11, 1952 (R. 17 *et seq.*). These depositions admittedly had been filed with the Clerk of the trial court, but had not been opened, read or considered by the trial judge when he ruled adversely to Petitioner and forced Petitioner's case to trial. Respondent's trial counsel urged upon the trial court the bare fact that defendant's deposition had twice been taken, but Petitioner's

trial counsel recall that no reference was made either to the content or substance of Petitioner's testimony, nor to the contents of Petitioner's written statement which was attached to the deposition as an exhibit. Notwithstanding, Respondent now attempts to persuade this Court that the trial judge was completely informed as to the contents of the two written depositions and the statement, and as a consequence, evaluated the nature and effect of such written testimony. This wholly misleading impression is created in Respondent's brief, at the places hereinafter indicated. We present our comment in the parenthetical paragraphs following each instance.

(a) Resp. Brief, Page 5, where it is stated:

"At the time the judge overruled the third application for continuance filed on behalf of the defendant, he had these depositions and statements made by the defendant before him and realized fully that the defendant, if present at the trial, could not testify to any facts bearing upon the question of liability. He realized too, that the only real issue remaining to be tried was the question of injuries, about which the defendant admittedly knew nothing."

(The trial judge did not consider the contents of the depositions, and had no basis for knowing what the defendant would or could testify to if he were present at the trial).

(b) Resp. Brief Page 17, where it is stated:

"Of course, defendant's brief completely disregards the two depositions of the defendant which were on file and available to the trial judge at the time he overruled the defendant's second application for continuance."

(Respondent, by the use of the words "on file" and "available," attempts to imply that the trial judge *availed* himself of the contents of the depositions in

his deliberation on Petitioner's third application for continuance. This implication has no foundation in fact.)

(c) Resp. Brief Page 17, where it is stated:

"In other words, the trial judge had before him both of defendant's depositions at the time he overruled the third application for continuance."

(Again, this affirmative statement and its implications have no foundation in fact.)

(d) Resp. Brief Page 18, where it is stated:

"Therefore, we respectfully submit that the trial judge *did* have before him ample evidence of probative value in the form of defendant's own depositions upon which to exercise a sound discretion in determining that defendant's absence thereafter could not materially affect his defense of the only real issue remaining in the case."

(This is another example of the distortion of the true circumstances surrounding the third application for continuance. The fact that the depositions were unopened and not actually considered by the trial judge, although merely on file in the clerk's office, certainly deprives Respondent of the argument that the trial judge actually knew what the effect of Petitioner's written depositions would have upon the adequate presentation of his case. Respondent's argument in this connection has no foundation in fact and is grossly misleading.)

(e) Resp. Brief Page 18, where it is stated:

"The depositions were before the trial judge at the time he ruled on the motion, and the State Supreme Court recognized this fact."

(We are compelled to point out that Respondent's repetition of this misleading fact has colored his en-

tire argument, and created an atmosphere wholly contrary to the actual circumstances surrounding the ruling of which Petitioner here complains. The fact that the Supreme Court of Missouri, too, was persuaded by a similar argument by Respondent, premised upon the concept that the trial court actually read and considered the depositions, has no relevancy herein, since that reviewing court also was acting upon an erroneous assumption.)

(f) Resp. Brief Page 21, where it is stated:

"The State trial judge had the pleadings before him, he had defendant's two depositions before him. He knew what the issues were, and, knowing this, realized fully that defendant's absence could not in any way materially affect the only real issues left open for trial."

(While one mistake on the part of Respondent in asserting a misleading fact might be excused on the grounds of inadvertance or misunderstanding, Respondent's persistent repetition of the misleading fact shows that such assertion was not the product of mere inadvertence, but rather an integral part of a strategy calculated to make the non-existent fact take on the semblance of reality by the device of mere constant repetition.)

Respondent persists in telling this Court unequivocally that the trial judge had *actual knowledge* of what was contained in Petitioner's two written depositions, and *actually weighed* and measured the effect of this written testimony in light of the pleadings and issues. This was not true. *The first time the trial judge knew what was in the written depositions was when they were actually introduced in evidence in the course of the trial.* We submit that we are correct in the statement in our first brief that the Supreme Court of Mis-

souri, only by hindsight, exonerated the trial judge's act in denying Petitioner's motion for continuance.)

(g) Resp. Brief Page 34, where it is stated:

"The State trial court had before it the pleadings and the two depositions of the defendant at the time it ruled on the third application for continuance * * *."

(Again, a repetition of the misleading statement.)

(h) Resp. Brief Page 34, where it is stated:

"Only after the defendant's second deposition had been filed with the trial court and it became apparent that his appearance could not in any way materially effect any of the issues to be tried did the trial court overrule defendant's third application for further stay of the proceedings."

(This statement, together with the preceding statement, both found in the conclusion of Respondent's brief, demonstrates the extent to which Respondent has attempted to alter the entire atmosphere of the matter pending before this Court, by applying, with a loose brush, a pigment intended to obscure the real fact.)

Respondent's obvious emphasis on the assertion that the trial judge had actual knowledge of the contents of Petitioner's depositions only serves to demonstrate the importance Respondent places upon this pivotal point. Indeed, the question of what actual knowledge the trial judge had at the time of his ruling is one of the most critical issues here. However, Respondent is entirely in error in his assertion that the trial judge had such actual knowledge. To the extent that this issue is determinative of Petitioner's rights, it seems manifest that such issue must necessarily be decided in Petitioner's favor. Even if there were any doubt on this issue, established public policy requires that such doubt be resolved in favor of the serviceman. (See Petitioner's original brief, p. 23.)

Plaintiff Below, by Filing an Amended Complaint, Broadened the Issues Upon Which the Trial Was Had.

In our original brief, we pointed out that the plaintiff below, by filing her amended complaint (called petition), broadened the issues so that *when the trial was had, Petitioner (defendant below) could not possibly know what issues he would have to meet.*

In Respondent's brief, the wholly erroneous statement is made at pages 10 and 24:

> "* * * the issues were narrowed by the amended petition, not broadened."

This patent error is disclosed even from Respondent's brief wherein it is said at page 24:

> "The original petition set up two grounds of negligence, namely, (1) excessive speed, and (2) the driving of the car off the highway and into a tree."

Contrary to Respondent's statement, reference to the original complaint (R. 3), discloses that in paragraph 4 of the complaint (called petition), plaintiff charged that the defendant

> "carelessly and negligently entrusted the operation (of the automobile) thereof to his agent, when he knew, or by the exercise of ordinary care, should have known, that she was of immature age, was not licensed to operate a motor vehicle upon the highways of this State and that she was incompetent and incapable of properly and safely operating said automobile."

The shifting of position and theory by the plaintiff below, actually broadened the issues the petitioner was required to meet at the trial, since under the Missouri rule, in the trial of a *res ipsa loquitur* case, the plaintiff may introduce evidence of specific negligence so long as he does not

show that negligence to be the sole proximate cause of the accident. Thus, when plaintiff by her amended complaint, withdrew all allegations of specific negligence, *the door was left open for her introduction of evidence on any one of several grounds of negligence.* Since Petitioner's depositions had been taken for the purpose of meeting only the allegations in the original complaint, such depositions were therefore of no real benefit in the presentation of Petitioner's defense, and because of his military service in Korea at the time of the trial, he was at a distinct disadvantage in preparation for trial and in the actual presentation of his case. The Soldiers and Sailors Civil Relief Act was expressly designed to avoid the imposition of such hardship upon an absent serviceman.

Respondent's argument has gone far beyond the confines of the record, but if we indulge in a refutation of these many extraneous matters, we are fearful that we may obscure the single issue which merits this Honorable Court's attention.

The only issue for consideration herein is whether the trial court abused its discretion in forcing the Petitioner's case to trial during his enforced absence in Korea on military service. Despite the misleading coloration produced by Respondent's brief, *the fact remains that the trial judge, at the time he denied the continuance, did not actually know what defendant had testified to at his two earlier depositions.* The trial judge's denial of Petitioner's third application for a continuance was in every respect arbitrary, and constituted a gross abuse of discretion. This ruling effectively denied Petitioner his day in court. Manifestly, the Civil Relief Act was intended to prevent such miscarriage of justice.

Loud overtones of Respondent's brief suggest that the absent serviceman could suffer no detriment by being forced to trial merely because he might suffer no monetary damage. *It is particularly significant to note that Respondent's brief is wholly devoid of any reply to the argument and contention contained in Petitioner's first brief* (B-2, Pages 18, 49 and 50). We firmly contend that a litigant has a right to his day in court to defend his personal reputation and integrity fully aside from his monetary injury. If a defendant has been deprived of his day in court and has been branded, in absentia, as a careless and irresponsible person, no amount of monetary indemnification can erase such permanent blemish.

Petitioner most earnestly contends that a discerning appraisal of the record below, free from the coloration flowing from Respondent's brief, will demonstrate that the trial court was guilty of a gross abuse of discretion in refusing to grant Petitioner's application for continuance. Petitioner respectfully prays that this Honorable Court grant to him its writ of *certiorari,* and that upon a full hearing of this cause upon the return of said writ, the judgment of the Supreme Court of Missouri be reversed, with directions, in effect, granting Petitioner a new trial.

Respectfully submitted,

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